

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Protection Act of 2005)	CG Docket No. 05-338

**COMMENTS OF ROBERT H. BRAVER
IN RESPONSE TO WESTFAX, INC.'S
PETITION FOR CONSIDERATION AND CLARIFICATION**

INTRODUCTION

I am writing today in response to the Commission's request for comments on Westfax, Inc.'s Petition for Consideration and Clarification.

In 1997, as an owner of a smaller (30 employee) software company, I became frustrated with the proliferation of junk faxes sent to my business as well as junk faxes and telemarketing calls targeting my home telephone service, all in violation of the TCPA. I became incensed when, after contacting the junk fax senders and telemarketers, it was apparent that most were well aware of the TCPA and the Commission's regulations, but persisted anyway. Because I had the time and resources, I began to exercise my rights under the TCPA to seek statutory damages and injunctive relief against violators.

I quickly found out that many defendants would attempt to crush and intimidate plaintiffs, and twist and distort the language of the statute and/or regulations in a (sometimes successful) effort to confuse a court.

Therefore, as a preliminary matter, I would urge the Commission to be cautious as to any language in its subsequent order, however innocuous, that can be used by an entity whose business model includes TCPA violations¹ to defend against such violations.

**THE EXISTING REGULATIONS ARE CLEAR AND RELEVANT
AS TO WESTFAX'S CONCERNS**

Applicability of the TCPA and JFPA to messages sent to fax servers

Westfax correctly states that the Commission's 2003 Report and Order clarified that personal computers equipped with fax modems and fax servers are indeed "telephone facsimile machines" for purposes of the TCPA. Westfax goes on to state that the 2006 Report and Order, "does not address efaxes or fax servers," but neither does the Junk Fax Prevention Act of 2005 ("JFPA").

¹ I am speaking generally, and not specifically as to the Petitioner, Westfax, Inc.

Simply put, there is nothing more to say about efaxes or fax servers. Had Congress intended to limit or eviscerate the TCPA's junk fax protections as they relate to facsimile transmissions which happen to be received by fax servers (as Westfax's petition could be construed as seeking), it had ample opportunity to do so with the JFPA.

Certainly, the transmission of an advertisement sent strictly as an email message is not a facsimile and does not fall under the TCPA. However, the fact that a fax recipient utilizes a fax server, either directly or through an outsourced service (e.g., the eFax service provided by j2 Global), has no bearing on the issues raised in Westfax's petition.

My niche-market software business having run its course, I now am employed by a telecommunications and networking equipment vendor². But as a side-business left over from my software company days, I continue to personally provide Internet services including email to a number of clients, including two hospitals, an electric cooperative, several non-profits, as well as a number professionals and individuals, to include family members and myself.

Dealing with unsolicited and unwanted marketing messages, which would effectively destroy email as a viable medium if left unabated, is a major concern which I am keenly aware of. I estimate that for every legitimate email that my servers accept on behalf of a client, about 200 spam messages are rejected based on the reputation of the connecting IP address, or marked and directed to a spam folder after employing resource-intensive spam filtering based on the message content.

Unwanted advertisements sent strictly as email messages involve different technological remedies and policy issues, and are subject to the CAN-SPAM Act and state laws. While unsolicited email advertisements are not in and of themselves prohibited by law, they are pretty much universally prohibited by service providers' policies. Individual senders who violate these policies often quickly find their service terminated. Service providers are incentivized to enforce this widely codified social contract because if they are lax, they will find that emails received from IP addresses belonging to them are rejected by a significant portion of email servers worldwide.

What the CAN-SPAM Act and state laws involving fraudulent email practices do is address the tactics often employed by spammers who attempt to circumvent the self-protecting nature of the Internet. I personally have used my state's fraudulent email laws and the CAN-SPAM Act to pursue violators. In one such case, I obtained a substantial money judgment and injunction in federal court against a well-known violator, and had the privilege of testifying against him at his sentencing hearing where he was subsequently sentenced to four years in prison.

Unlike messages that are strictly sent as emails, facsimile transmissions still involve the finite bandwidth of a telephone line (whether POTS or a digital channel) and effectively bypass the sophisticated and effective spam filtering that is widely employed.

I personally have an eFax number which I use on occasion to test customers' equipment in the course of my employment, or to receive a document in a pinch when I'm on the road, as there is almost always a nearby fax machine (such as the one in my home if I leave an important paper behind and need my wife or one of my kids to quickly and easily send it to me). While I have a great deal of power to filter or outright block junk email senders, I certainly can't filter or block my eFax messages. Each eFax message I receive must be manually opened by me just to see what it is. My eFax number, which I have had for

² My comments are my own personal opinions only.

many years, is exclusively assigned to me and is for my benefit, and I am the recipient of any messages sent to that number so long as I maintain my subscription and eFax continues to offer the service to me.

If anything, current technology and service offerings suggest strengthening protections against unwanted faxes. It is data intensive and cumbersome to receive an eFax on my tablet or smart phone, and the country's major wireless providers (including mine) are pushing customers to service plans that move from limited included voice minutes and unlimited data to plans with unlimited voice service and limited data with overage charges.

If the Commission were to find that eFaxes or faxes received by a fax server do not fall under the TCPA's protections, the floodgates would open for marketing messages that would arrive in recipients' mailboxes unabated. Unlike messages that are strictly sent as emails, facsimile transmissions still involve the finite bandwidth of a telephone line (whether POTS or a digital channel) and effectively bypass the sophisticated and effective spam filtering that is widely implemented. Fax broadcasters typically employ significant outbound call capacity so that even very large "fax blasts" are sent in parallel very quickly. For a typical business with a fax server, an ISDN PRI circuit or SIP trunks for inbound and outbound calls, and block of voice and fax DID³ numbers for each employee, a typical blast of incoming junk faxes targeted to identifiable fax server recipients would not only saturate the businesses' fax capacity, but their telephone capacity overall.

Put simply, if advertisers and fax broadcasters can send advertisements with impunity to fax numbers that can be identified as being serviced by a fax server, these services would quickly lose their value to the recipients.

Liability of Fax Service Providers under the TCPA or JFPA

The growing use of fax servers in the enterprise, as well as services such as eFax, has no bearing on opt-out notices as proscribed under the JFPA, or liability of fax broadcasters for encouraging or knowingly allowing customers to send unlawful faxed marketing materials. Fax transmission service providers typically advise customers about the existence of the TCPA, and incorporate its terms directly or indirectly in their contractual agreement with their customers. The requirements are clear and readily available⁴, and it doesn't take a law degree to draft a compliant notice. Legitimate users of services such as the petitioner's will be in compliance, illegitimate users won't.

If fax broadcasters are to be effectively treated as a common carrier as to any liability for violations by their customers, they need to have no involvement in the content of the message, or actual notice of the violations while failing to take steps to prevent such violations. Particularly if a fax broadcaster is going to offer an additional service of collecting opt-out requests on behalf of a client, it is going to properly vet its client and have an indemnification agreement in place. In order for a plaintiff to hold a fax broadcaster liable as to being highly involved or having actual notice of the transmission of a prohibited facsimile advertisement, the plaintiff has the burden of proof. That is the standard now, and it continues to be a sound one.

I thank the Commission for the opportunity to comment on this matter.

³ Direct Inward Dial. Typically a contiguous block of telephone numbers.

⁴ A Google search on "fax opt out notice" yielded <http://www.fcc.gov/guides/fax-advertising> as the first result.

Respectfully submitted,

s/Robert Braver

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